



COURT OF APPEAL MEDIATION SCHEME

The mediation

The purpose of mediation is to help parties in dispute to resolve their differences, in whole or in part, outside the Court process. It is a speedy and informal process, in which an independent person (the mediator) assists the parties.

Voluntary nature of the Court of Appeal Mediation Scheme

The mediation will only proceed if all parties agree. The parties are not obliged to take part in the scheme, and they and the mediator are free to terminate the mediation by informing the Civil Appeals Office or the administrators of the scheme – Centre for Effective Dispute Resolution (through its service arm CEDR Solve) at any time and without giving a reason.

The mediator has no power to make orders in relation to a case. The mediator's role is to assist the parties to reach a mutually acceptable solution which will bring the proceedings to an end – ideally as a whole, but if not, at least in part.

However, it is a condition of the parties entering into the mediation under the Court of Appeal Scheme that they will earnestly try to reach a solution.

The powers, role and independence of the mediator

The mediator's job is to help the parties see if the matter is capable of amicable resolution, helping them look at issues in dispute in a number of different ways which may extend beyond a merely legal view of the problems.

The mediator is an experienced and independent neutral person who has been approved for membership of the panel by the Court and who will help the parties come to their own agreement on how to settle the dispute. The mediator is not a judge, and furthermore is not employed by or acting as a representative of Her Majesty's Courts Service or the Judiciary, and is entirely independent from them.

The mediator is and must be wholly independent of the parties in dispute and before the mediation will have undertaken a preliminary check to ensure that there is no conflict of interest in acting. Once the parties have received the names of possible mediators, they are asked to bring to the attention of the Scheme administrator any matter which leads them to believe that a conflict of interest which prevents him from acting as mediator, so that if there is indeed some conflict, another mediator may be found.

The mediator is not an adviser to any of the parties. It is not the mediator's role to tell the parties what their rights are. However, the parties may if they all wish ask the mediator to offer an opinion on matters which arise if it might help the parties to resolve their disagreement. Not every mediator is willing even to do this, as it might be seen as compromising neutrality if the view is perceived as unfavourable to one party.

The parties must agree, as a condition of entering the mediation, not to make any claim against the mediator and/or the Court or its officials or CEDR Solve, the administrators of the scheme, in connection with this mediation.

The confidentiality of the process and any settlement

It is a condition of entering the mediation process that the parties treat all discussions in and documents created for the mediation as "without prejudice" and confidential. This means that what is said or written in relation to the mediation may only be used for the purpose of the mediation. No party may raise, either later in the appeal (if the mediation does not settle the case) or in any other proceedings any statement either oral or written, made in the course of the mediation. The exceptions to this confidentiality rule are:

- A short report will be made to the Court by the mediator and/or CEDR Solve at the end of the mediation which simply records the date on which the mediation took place and its outcome. The Court will not otherwise have power to enquire about what happened within the confidentiality of the mediation.
- If a settlement was reached, the Court record would normally reveal the terms of the agreement, and a copy would be kept on the Court file. Steps can be taken to keep such a record confidential if required.

The parties must agree not to serve a witness summons on or otherwise require the mediator or any employee of the Civil Appeals Office or of CEDR Solve or any other person attending the mediation to testify or produce records, notes or any other information about what happened at the mediation in any future or continuing proceedings.

Private sessions

The mediator may speak to each of the parties separately at the mediation. This is to enable the mediator to understand and communicate each party's position better. The mediator will not divulge any matter discussed privately with one party to the other party unless expressly authorised to do so.

Administration of the Court of Appeal Scheme

This is now handled by CEDR Solve – the services arm of the Centre for Effective Dispute Resolution – of 70 Fleet Street, London EC4Y 1EU, telephone 020 7536 6060, who liaise closely with Civil Appeals Office staff in relation to the scheme. They are responsible for nominating mediators suitable for each case, preparing the mediation agreement and liaison with the parties over dates and exchange of information. They can also help over venues,

though the responsibility for finding these rests with the parties. They will also report to the Court and obtain feedback about the mediation and the mediator at the end of the process. The Court retains responsibility for the composition of the panel of mediators and for any adjustments to the fees payable by the parties.

Family cases are not administered by CEDR Solve. The Civil Appeals Office will appoint a suitable mediator from specialist family mediation panels provided by the Law Society, the UK College of Mediators or the Solicitors' Family Law Association, and will monitor progress of the mediation process.

Mediation fees for non-family cases

The fixed fee for each party for the mediations in all but family matters is £850 plus VAT, totalling £1020, which allows for the administrative work setting up the mediation and for the mediator's time in preparing and reading documents for about up to 9 hours, divided between preparation and conduct of the mediation itself. Each party will bear their own costs of the mediation unless otherwise agreed between the parties, and this includes both the Scheme mediation fee and the legal costs of representation by their own legal team. If a party has Legal Services Commission funding to cover the appeal, this will cover that party's legal costs for preparing for and attending the mediation. Application should be made to the LSC (or to any other funder, such as an insurer) for authority for the mediation fee as well before seeking a waiver of fee.

Mediation fees for family cases

Mediation fees in family cases will be negotiated between the mediator and the parties. In appropriate cases the Court will appoint a mediator who is prepared to offer services at a reduced rate or on a pro bono basis.

Fees in Complex or large cases

In cases involving exceptional complexity or in which sums of more than £1 million pounds are at stake, CEDR Solve is authorised by the Court to suggest that a properly commercial mediation be arranged, or, if it is preferred by the parties that the mediation remains within Court of Appeal Mediation Scheme, to propose higher fees subject to Court approval.

The details and terms of the fee structure are set out on the Fees Schedule, Form 56C.

Who attends the mediation?

Save in exceptional circumstances, the parties themselves must attend the mediation.

At their choice they may be accompanied by a lawyer or a relative, friend or colleague. In complex matters it is always advisable for a party to be legally represented, and indeed in most mediations, parties will have their lawyer present to advise throughout, bearing in mind that the mediator cannot advise either party.

In the case of any party which is a firm, company or association, a representative (who may be that party's solicitor) should attend who is authorised to reach a binding settlement, and who is capable of receiving very promptly (*ie.* immediately by telephone) any further authority that is needed as a result of the discussions. The process will not work if adjournments are needed whilst representatives seek authority. Authority means the **power** to approve a settlement at any level, always accepting that each party has freedom to choose whether to settle and if so at what level.

No witnesses are formally called in the mediation process in appeal mediations, whether factual or expert, but their attendance may in any given case be helpful.

Stages in the mediation process

An appellant or respondent who wants to opt for mediation through the Court of Appeal Mediation Scheme should indicate this as soon as possible by completing the attached form and sending it to the Civil Appeals Office as soon as possible. This may be at the party's own initiative, or in response to a recommendation from a Lord or Lady Justice in giving permission to appeal that the case is one which the Court feels is appropriate for mediation.

It should be borne in mind that the Court of Appeal, like every civil court, has power under CPR Part 44 to take into account the conduct of parties in relation to unreasonably refusing to take part in mediation when deciding what costs order to make at the conclusion of an appeal, even when the refusing party is otherwise successful in the appeal. Since the decision of the Court of Appeal in *Dunnett v Railtrack* [2002] 2 All ER 850, this must particularly be borne in mind where the Court has advised the parties that it considers that mediation or some other form of alternative dispute resolution should be attempted. See also *Halsey v Milton Keynes* [2004] EWCA Civ 576.

Once either party or legal representative on a party's behalf has indicated a desire to try mediation through the Court of Appeal Mediation Scheme, or the Court has recommended that it be tried, the Court will give details of the case on a confidential basis to CEDR Solve and ask CEDR Solve to contact the parties in order to see if a mediation can be agreed. If agreed, CEDR Solve's administrator will then put in motion the process of nominating three suitable mediators from whom the parties must choose one. In default of agreement, CEDR Solve will make the final nomination taking into account the representations of the parties. CEDR Solve will also help with finding a convenient date, arranging for exchange of documents and bundles between parties and mediator and if asked over finding a venue, though this is normally the responsibility of the parties to find and fund. CEDR Solve will also require payment of the fees in advance of the mediation in accordance with the terms of the Fees Schedule. The mediation will be sent for signature when the mediation is set up. If it has to be amended later, the revised version will be signed at the mediation.

Parties should exchange and send the mediator a short summary of their position in writing, preferably no more than 5-10 pages long, but which may be accompanied by documents, though bearing in mind that the mediator is only normally expected to do 4 hours preparation.

On the mediation day itself, after brief private meetings, there will usually be a meeting chaired by the mediator at which the parties will be present at the same time in the same room. The mediator will explain the nature of the process and then normally invite each party or their representative to speak briefly as to their position. The mediator may ask them questions in each other's presence.

It will then be for the mediator to decide what further meetings are warranted and whether they should be with the parties separately or together. It is usual for there to be some separate meetings. At these, the mediator will probably be looking not only at each party's rights and obligations but also at their needs and expectations, seeking to encourage the parties to propose and embrace solutions to their differences.

A time limit of 5 hours has been placed on Scheme mediations, with the fee including preparation time by the mediator. It is normally clear before then whether sufficient progress is being made to justify continuing with the process. Any extension of time is a matter before the mediator and the parties. No further fee is payable without specific agreement to that effect.

Agreement in whole or in part at the mediation

Upon reaching an agreement, the terms of settlement will be recorded in writing at the conclusion of the mediation and signed by the parties. They should then be lodged by the mediator either direct or through CEDR Solve with the Civil Appeals Office, and the parties should also lodge a consent order.

It may be possible to resolve some but not all the issues in dispute. In that case, any partial agreement should be recorded in writing and signed by the parties, and can be lodged with the Court so that proceedings can be treated as resolved to that extent.

No agreement at the mediation

If no agreement is reached, CEDR Solve will inform the Civil Appeals Office so that the appeal process can continue.

Feedback about mediation

CEDR Solve will normally contact the parties to a mediation shortly after it has taken place to obtain feedback as to how it went and the impression given by the mediator. This feedback will be shared with both the mediator concerned and the Court in an endeavour to maintain the highest standards. Your participation in this process will be welcomed.

If you have general queries regarding mediation please contact CEDR Solve at

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